STATE OF MICHIGAN

COURT OF APPEALS

BRUCE WOLFORD,

Plaintiff-Appellant/Cross-Appellee,

v

FIRST NATIONAL INSURANCE COMPANY OF AMERICA,

Defendant-Appellee,

and

DR. MITCHELL Z. POLLAK,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 12, 2014

No. 315176
Oakland Circuit Court
LC No. 2011-120120-NF

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right following the trial court's final order dismissing his claim against First National Insurance Company of America (First National Insurance). Plaintiff specifically challenges the earlier, amended order granting summary disposition in favor of defendant, Dr. Mitchell Z. Pollak (defendant), and dismissing plaintiff's claim against him with prejudice. Defendant cross-appeals the same amended order, in which the trial court denied his request for sanctions. We affirm.

I. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. He asserts that *Dyer v Trachtman*, 470 Mich 45; 679 NW2d 311 (2004), does not preclude an examinee from pursuing a negligence claim against an independent medical examination (IME) physician if the IME physician was negligent in the "process" he used to reach his conclusions and opinions in the IME report. We disagree.

We review de novo the trial court's grant or denial of a motion for summary disposition. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). Whether a defendant owes a

particular plaintiff a duty to avoid negligent conduct is a question of law that this Court reviews de novo. *Dyer*, 470 Mich at 49.

In *Dyer*, 470 Mich at 47, the plaintiff alleged in an unrelated civil complaint that he injured his right shoulder and left knee during a physical altercation. The plaintiff subsequently had surgery on his right shoulder and during the course of discovery in the civil action, the opposing party hired the defendant to perform an IME of the plaintiff. *Id*. Before the examination, the plaintiff informed the defendant of his recent shoulder surgery and that the surgeon had placed restrictions on the movement of his right arm and shoulder, including a restriction that he should avoid lifting the arm above 45 degrees. *Id*. The plaintiff alleged that during the examination, the defendant nevertheless forcefully rotated his right arm and shoulder 90 degrees, which caused the labrum to detach from his right shoulder. *Id*. The plaintiff alleged, among other claims, medical malpractice against the defendant and later sought to amend the complaint to raise an ordinary negligence claim. *Id*. at 47-48.

Our Supreme Court held that "an IME physician has a limited physician-patient relationship with the examinee that gives rise to the limited duties to exercise professional care." *Dyer*, 470 Mich at 49. The relationship "does not involve the full panoply of the physician's typical responsibilities to diagnose and treat the examinee for medical conditions." *Id*. at 50. The *Dyer* Court held that "[t]he limited relationship encompasses a duty by the examiner to exercise care consistent with his professional training and expertise so as not to cause physical harm by negligently conducting the examination." *Id*. at 55. However, "[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports." *Id*. at 50. In a footnote, the *Dyer* Court noted:

> This is not to say that an IME physician, like any health professional, cannot be held liable for ordinary negligence under other circumstances. For example, during oral argument a question was raised regarding a scenario in which an injury is caused when the IME physician overturns a medicine cabinet onto the examinee. Here, however, the injury and alleged negligence occurred during the examination itself and were directly related to defendant's exercise of his professional services. Hence, the facts cause plaintiff's claim to sound in medical malpractice. [*Id*. at 54 n 5.]

Turning to the present case, defendant, as an IME physician, had a limited physician-patient relationship with plaintiff that encompassed a duty by defendant to exercise care "consistent with his professional training and expertise as not to cause physical harm by negligently conducting the examination." *Id*. at 49, 55. Neither party alleges that defendant directly caused physical harm by negligently conducting the examination. Nonetheless, plaintiff argues that the trial court erred by granting defendant's motion for summary disposition because *Dyer* does not preclude a plaintiff from pursuing a negligence claim against an IME physician if the IME physician was negligent in the "process" he used to reach his conclusions and opinions in the IME report. However, plaintiff's argument concerning "process" is in direct conflict with the *Dyer* Court's holding that an IME physician is not liable to an examinee for damages resulting from the conclusions the IME physician reaches or reports. *Id*. at 50. In other words, defendant's report reflects his subjective opinions and conclusions based on his review, examination, and interview of plaintiff. Moreover, the language of the *Dyer* Court's footnote

does not provide any relief for plaintiff in this case. Unlike the hypothetical situation raised in the footnote, plaintiff did not allege or establish that defendant committed ordinary negligence during the course of the examination. See *id*. at 54 n 5. The trial court properly granted defendant's motion for summary disposition. See MCR 2.116(C)(8).

II. SANCTIONS

Defendant argues on cross-appeal that the trial court clearly erred by denying his request for sanctions under MCR 2.114(E) and (F). We disagree. We review for clear error the trial court's determination whether an action is frivolous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 661-662.

MCR 2.114(E) provides:

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Under MCR 2.114(F), "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." MCL 600.2591(3) provides:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

"Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case." *Kitchen*, 465 Mich at 662.

We agree with the trial court that plaintiff's claim was not frivolous within the meaning of MCR 2.114. Plaintiff advanced a good-faith argument for the extension, modification, or reversal of the law pertaining to an IME physician's duty to the examinee. See MCR 2.114(D)(2). In addition, we cannot say that plaintiff's claim was wholly devoid of arguable legal merit. See MCL 600.2591(3)(a)(*iii*). Although plaintiff was ultimately unsuccessful with his argument, the mere fact that he did not prevail does not render the complaint frivolous. *Kitchen*, 465 Mich at 662. The trial court did not clearly err by denying defendant's request for sanctions.

Affirmed. No costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Mark T. Boonstra